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Supreme Court of the United States

OCTOBER TERM, 1936.

No. [redacted]-57

LANASA FRUIT STEAMSHIP AND IMPORTING COMPANY, INC., A BODY CORPORATE,
Petitioner,

vs.

UNIVERSAL INSURANCE COMPANY,
A BODY CORPORATE,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

D. ROGER ENGLAR,
FRANK B. OBER,
Counsel for Respondent.

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Supreme Court of the United States

OCTOBER TERM, 1936.

No. 983.

LANASA FRUIT STEAMSHIP AND IMPORTING COMPANY, INC., A BODY CORPORATE,

Petitioner,

vs.

UNIVERSAL INSURANCE COMPANY, A BODY CORPORATE,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

This brief is filed in answer to a petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit, which affirmed the decision of the United States District Court for the District of Maryland. The opinion of the District Court is reported in 16 F. (s) 912. The opinion of the Circuit Court of Appeals has not yet been reported but will be found on pages 36-46 of the record.

The case involves a loss of a cargo of bananas. The successful carriage of this highly perishable commodity is dependent upon such factors as the condition of the fruit when loaded, proper stowage, temperature, whether the weather conditions permit the hatches to be kept open, and whether the direction of the wind aids or destroys the efficiency of the ventilators, as much as upon the mere length of the voyage.

The Petitioner, though claiming that the loss was proximately caused by stranding delay, has failed to set forth the absence of any of these other causative factors. The absence of the usual allegations that the fruit was sound and would have arrived safely but for the stranding, or that the stranding was the proximate cause of the loss, or, indeed, that the stranding resulted in any considerable delay at all, makes the declaration insufficient to set forth a cause of action. As the declaration must be construed against the pleader (*Poe on Pleadings,* Sec. 557), and it is equally possible under the declaration to attribute the loss to heavy weather delay prior to the stranding, improper stowage, unsound fruit, or bad wind conditions, the demurrer to the declaration would have had to be sustained in any event, since the demurrer to the pleas mounts up to the first error in the pleading (*Poe on Pleadings,* Sec. 706). The question raised by the petitioner is not, therefore, squarely presented. Nevertheless, we wish to answer briefly the four reasons for review, upon which the petitioner relies (R. 6-7).

I.

Petitioner's claim that the Ninth Circuit Court of Appeals would have decided contrary to the Fourth Circuit Court, *if* the same question had been presented there before the decision in the case at bar, is too far fetched to

require serious consideration. The case relied upon (*Fireman's Fund Insurance Co.* v. *Trojan Powder Company,* 253 Fed. 305) merely held that where a vessel was prevented from completing her voyage by stranding, a cargo insurer whose policy contained an agreement to pay forwarding charges, was liable for the expense of transshipment,—the Court pointing out that there was no damage to the cargo. In the case at bar, however, the vessel completed the voyage without expense due to the stranding; and an entirely different question is presented, namely, whether the insurer is liable for loss due to deterioration of the cargo from inherent vice during delay.

As the policy in that case provided for English law, and as even the petitioner concedes that the English law is against it on the facts of this case, it is clear that the Fireman's Fund case cannot be cited as an authority in the present case.

II.

There are no allegations whatever in the declaration justifying the argument that the policy in question was a New York policy and should be governed by New York law. As the declaration must be construed against the pleader, such facts cannot be *assumed.* Even if we speculate as to facts not alleged by the pleader, the evidence indicates that the contract was not a New York contract, because the insurer was a New Jersey company and the policy in all probability was delivered in Maryland (R. 15). In any event, as the Circuit Court of Appeals has pointed out (R. 44), under the well settled decisions of this Court, the Federal courts follow the general law, and are not bound by State decisions.

III.

There is no merit in the claim that, as a question of general law, the case has been decided in a manner "probably untenable" and in conflict with the weight of American authority.

The English law denies liability for delay damage under this form of policy, which is the usual form of Lloyd's Cargo Policy.

> *Taylor* v. *Dunbar,* L. R. 4 C. P. 206; 38 L. J. C. P. 178; 17 W. R. 382.
> *Pink* v. *Fleming,* L. R. 25, Q. B. D. 396.
> *Arnould on Marine Insurance,* 11th Ed., Vol. 2, Sec. 778.
> 17 (*Halsbury*) *Laws of England,* Sec. 859.
> *Marine Insurance Act of 1906,* Sec. 55 (2) (b).

As this Court said in *Queen Insurance Co.* v. *Globe & Rutgers Fire Insurance Co.,* 263 U. S. 487, 493:

> "There are special reasons for keeping in harmony with the marine insurance laws of England the great field of this business. * * * We repeat that we are dealing not with general principles but only with the construction of an ancient form of words, which always have been taken in a narrow sense * * *"

As pointed out by the Circuit Court of Appeals (R. 44), this states a well established doctrine supported by numerous decisions. The rule is particularly applicable in a case such as the case at bar, where the question is whether to follow the settled decisions of the English Court in interpreting the "ancient form of words" in an English form of marine insurance policy. As pointed out in the opinion of the Circuit Court of Appeals, the English rule has been followed in *Cory* v. *Boylston Fire &*

Marine Insurance Co., 107 Mass. 140, and in *Perry* v. *Cobb*, 88 Maine 435. See also:

Bond v. *The Superb*, 1 Wall. Jr., 355, 3 Fed. Cas. 1624.
The Casey (D. C. N. Y.), 39 F. (2d) 136, 138.
1 *Phillips on Insurance*, Sec. 1089.
Jordan v. *Warren Insurance Co.*, 1 Story 342, 352.
38 *C. J.* 1097.

The petitioner's statement that the earlier Massachusetts case of *Tudor* v. *New England Insurance Co.*, 12 Cush. (Mass.) 554, is contrary, ignores the existence in that case of actual physical damage due to salt water (p. 555) and the fact that the Massachusetts rule is clearly laid down in accord with the English authorities in the later case of *Cory* v. *Boylston*, 107 Mass. 140, supra.

The only jurisdiction in this country which in any way indicates a view contrary to the English law, is New York. *The Corsicana, Brandyce* v. *U. S. Lloyds*, 203 N. Y. S. 10, affirmed per curiam, 239 N. Y. 573.

It seems too early, however, to determine that the New York State Court has departed from the rule prevailing elsewhere, for the Court of Appeals gave no opinion in the case, and the Appellate Division specifically stated (203 N. Y. S. 10, at page 14) that "*it could subscribe to the doctrine*" of *Taylor* v. *Dunbar, Cory* v. *Boylston Fire & Marine Insurance Co.*, and *Perry* v. *Cobb*, supra. Yet the opinion does not give any logical basis for distinguishing such cases which involved delays due to such perils of the sea as tempests, from other perils of the sea like collisions, as in *Pink* v. *Fleming*, L. R. 25 Q. B. D. 396 supra, or from stranding, as in the case at bar.

As there is manifestly no logical distinction between a peril of the sea such as a tempest, and a peril of the sea such as a stranding or collision, it is too early to say that the New York Courts are in conflict with the decisions elsewhere.

Manifestly the Court of Appeals of New York must:

(a) follow the rule of *Taylor* v. *Dunbar,* to which the Appellate Division professes to subscribe; or

(b) formulate some distinction not hitherto recognized between delays due to some perils of the sea such as tempests, and delays due to other perils of the sea such as collision or stranding (fault cannot be the criterion in the present case since none is alleged in the declaration); or

(c) limit the *Corsicana* to the facts there involved, where the ship was unable to complete her voyage in a practical sense and was forced to put into a port of refuge so that the continuity at least of the voyage was completely broken, and refuse to extend it to a case such as the case at bar, where, because of a stranding, the ship was delayed for a few hours but successfully overcame the sea peril and completed the voyage.

Until we know which course the New York Court will follow, it is not accurate to say that New York is in conflict with other jurisdictions. Still less can the petitioner on the slender basis of the doubtful position of this one American court, sustain its assumption that there is an "American Rule" which conflicts with the English rule.

IV.

Petitioner attempts in the fourth reason assigned for the granting of the writ, to stress the supposed importance of the question presented, as well as the alleged conflict of decisions which have been dealt with above.

That the matter is not one of general importance is clear from the following:

(a) The parties in the case at bar have themselves placed a construction upon the policy, which determines the question on the facts of this *particular* case (*Insurance Co.* v. *Dutcher,* 95 U. S. 269, 273; *Williston on Contracts,* Revised Ed., Sec. 623); and the question is not, therefore, of general importance. The policy in the general coverage clause insured against "sea perils", but excluded in a printed memorandum clause, *partial* loss to fruit (R. 8). This, in turn, however, was modified by the typewritten provision (R. 12),—"Warranted free from particular average unless the vessel * * * be stranded".

The effect of this last clause was enlarged later to *specifically* include *delay damage* by a separate rider, which is contained in Exhibit A to Respondent's plea (R.19), at an increased premium. This rider containing *specific* coverage for delay damage was canceled before the loss here involved, and the premium reduced from 60¢ to 25¢ (R. 17). In the case of a partial loss, therefore, it is quite clear that the parties did not intend to cover liability for delay damage in the case of a *stranding,* excepting when they specifically contracted for such delay damage at an additional premium. Manifestly, therefore, since the word "stranding" alone was not interpreted by these parties to include deterioration of the fruit due to *delay* from stranding in the case of a *partial* loss, in like manner

they did not mean to include such delay damage in case of a *total* loss. Stranding (which is included in the term perils of the sea) must mean the same thing in the general coverage clause that it means in the partial loss clause.

To conclude upon this point, it is quite clear that the question which the petitioner attempts to present to this Court is confused by the existence of facts which show an interpretation of the policy by the parties and prevent the question of general interpretation from being squarely presented.

(b) Another reason why the question presented in this petition is not one of general importance, is that the case is concerned with an insurance policy into which the petitioner is attempting to read a meaning which, had it been intended, could have been clearly, easily and readily expressed by the parties.

In fact, as has just been pointed out, an intent to cover delay damage was clearly expressed in this very case by the parties when they wished to include delay damage due to a partial loss (R. 19). This accords with a general custom in the insurance business to *specifically* cover delay damage by riders where such is the intention.

Winter on Marine Insurance, 2d Ed., p. 97, says:

> "It is *usual* in some trades, such as the importation of fresh fruit, *specifically* to cover loss or deterioration resulting from prolongation of the voyage due to breakdown of the propelling machinery, rudder trouble, or other named causes * * *" (Italics ours.)

This last edition was written after the decision in the *Corsicana* (supra), showing that this decision has never been accepted as establishing the position of the peti-

tioner, or as having made it unnecessary to say so specifically if it is intended to cover the deterioration of a perishable cargo from delay. Surely there is no question of importance involved in attempting to define by decision the meaning of words in a contract which the parties can (and did when they wanted to) make clear themselves by appropriate language.

Dated May 29, 1937.

Respectfully submitted,

D. ROGER ENGLAR,

FRANK B. OBER,

Counsel for Respondent.